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In the Supreme Court of the United States

OCTOBER TERM, 1990

A.F. PLAZZO, ET AL., PETITIONERS

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether plans providing retirement benefits to respondent's insurance agents, who are characterized by respondent as "independent contractors" rather than as "employees," are subject to the requirements of the Employee Retirement Income Security Act of 1974.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Anthony Plazzo was an insurance agent who represented respondents, the Nationwide Companies, for more than 20 years. He contends that he was an "employee" of Nationwide for purposes of Section 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(6), and therefore is entitled to certain retirement benefits under plans sponsored by Nationwide. He is not entitled to those benefits if, as Nationwide contends, he was an "independent contractor" rather than an employee. Both the Department of Labor and the Internal Revenue Service have administrative responsibilities

under ERISA and have considered whether persons are "employees" for purposes of the Act.[1]

1. Plazzo operated an insurance business that he incorporated as Plazzo Insurance Services, Inc. From 1961 to 1983, Plazzo represented only the Nationwide Companies—which provide, inter alia, fire insurance, life insurance, and property and casualty insurance. Pet. App. 82-83. Nationwide sponsored two benefit plans for insurance agents such as Plazzo. Pursuant to its deferred compensation incentive plan, "Nationwide maintained a retirement account for Plazzo and * * * annually credited to that account a sum based on Plazzo's earnings from original and renewal fees for insurance policies." *Id.* at 26. Under the second plan, the extended earnings plan, Nationwide promised to pay Plazzo "a sum equal to his earnings from renewal fees over the prior twelve months" after he left the Company. *Ibid.*[2] Both plans provide for the forfeiture of benefits if an agent competes with Nationwide within a 25-mile radius of his former business location within one year after he stops representing the company. The plans also provide for forfeiture if a former agent ever induces a Nationwide policyholder to cancel a Nationwide contract. *Id.* at 26-27.

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[1] The Secretary of Labor has general administrative authority with respect to Title I of ERISA, 29 U.S.C. 1001-1168, which includes the definitional provisions at issue in this case and, among other things, the rules relating to reporting and disclosure and fiduciary responsibility. Title II of ERISA, which amended the rules governing the tax qualification of retirement plans (see 26 U.S.C. 401(a)), is administered by IRS. See Reorg. Plan No. 4 of 1978, § 101, 5 U.S.C. App. at 1374. The Act provides that with respect to the rules relating to the minimum standards for participation, vesting, and funding—matters over which both agencies have authority (see 26 U.S.C. 410(a), 411, 412; 29 U.S.C. 1052, 1053, 1082)—the Secretary of Labor shall follow IRS's approach. The agencies attempt to coordinate their administration.

[2] Nationwide reports that these plans are not qualified for tax purposes. However, Nationwide sponsors a separate retirement plan (not open to its insurance agents) that qualifies for favorable tax treatment. Nationwide's Opening Br. at 8, 11, *Darden* v. *Nationwide Mutual Insurance Co.*, No. 89-2759(L) (4th Cir.).

In 1983, Nationwide cancelled its agency agreement with petitioner, in part because Plazzo had sued the company for breach of contract. Nationwide subsequently decided that Plazzo had forfeited his benefits because Plazzo's son, allegedly with Plazzo's assistance, was selling insurance for other companies and had induced Nationwide policyholders to switch insurance companies. Pet. App. 83-84, 85. Had the benefits not been forfeited, Plazzo would have received approximately $150,000 under the deferred compensation incentive plan and approximately $120,000 under the extended earnings plan. C.A. App. 8-9, 27-28.

2. Section 3(2)(A) of ERISA defines a "pension plan" as either a plan that "provides retirement income to employees" or a plan that "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. 1002(2)(A).[3] If the plans are pension plans covered by ERISA, then the forfeiture provision is invalid because, under the vesting rules set forth in Section 203(a) of ERISA, 29 U.S.C. 1053(a), vested benefits are nonforfeitable. Section 203(a) further provides that benefits must vest according to alternative schedules. Since pension benefits must be fully vested under any schedule after ten years of employment and Plazzo represented Nationwide for more than 20 years, his benefits vested and are nonforfeitable if Nationwide's plans are subject to ERISA.

Nationwide concedes that the forfeiture provision in its plans is invalid if the plans are subject to ERISA. Br. in Opp. 4-5. However, Nationwide contends that ERISA is not applicable because Plazzo was not an "employee." As noted, the Act defines a pension plan as one that "provides retirement income to *employees*" or that "results in a deferral of income by *employees*." § 3(2) (emphasis added). In Nationwide's view, its insurance agents are independent contractors rather than em-

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[3] The district court in this case held that Nationwide's plans provide "retirement income" or "result[ ] in a deferral of income" to retirement. Pet. App. 71-76.

ployees, and therefore its plans are not "pension plans" within the meaning of the Act.[4]

3. Section 3(6) of ERISA, 29 U.S.C. 1002(6), defines "employee" as "any individual employed by an employer." Pet. App. 49. The district court agreed with Nationwide that Congress, in enacting Section 3(6), intended courts to apply "the classic common law test which was developed to define the distinctions between an independent contractor and an employee in order to determine whether vicarious liability would obtain in an employment relationship." Pet. App. 48, 62. In so holding, the district court expressly rejected (*id.* at 57-58) the approach followed by the Fourth Circuit in *Darden* v. *Nationwide Mut. Ins. Co.*, 796 F.2d 701, 706 (1986), on remand, 717 F. Supp. 388 (E.D.N.C. 1989), which held that the common law test is not applicable in this context.[5] The district court similarly paid no "special deference" to the judgment of the Department of Labor (Pet. App. 52), which had concluded that "the definition of

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[4] In other cases, persons have sought to sue under Section 502(a) of ERISA, 29 U.S.C. 1132(a), as "participant[s]" in employee benefit plans. Noting that " '[p]articipant' within the statutory scheme of ERISA is a subset of the term 'employee,' " the courts have determined that whether the person is entitled to bring suit depends on whether the person is an "employee." *Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1552 (D.C. Cir. 1990).

[5] The Fourth Circuit in *Darden* enunciated a three-factor test based on Section 2 of ERISA, 29 U.S.C. 1001. Section 2(a) states that Congress enacted ERISA because of its concern that "many employees with long years of employment are losing anticipated retirement benefits." 29 U.S.C. 1001(a). Under the Fourth Circuit's approach, ERISA protects persons who (1) reasonably anticipated that they would receive retirement benefits under a plan, (2) relied on that expectation, and (3) lacked bargaining power to obtain nonforfeitable rights contractually. 796 F.2d at 706-707. Although the district court derided that approach as "result oriented" (Pet. App. 57) and held that "no need or justification is shown here to suggest that any meaning other than a common law definition was intended by Congress" (*id.* at 62), the court inexplicably stated that it had weighed and assessed "both common law and *Darden*" factors in deciding whether Plazzo was an employee (*id.* at 69). However, while the court specifically considered each of the 12 common law factors in turn (*id.* at 62-69), it did not explicitly evaluate the facts of this case under the three factors set out in *Darden*.

'employee' as set forth in section 3(6) of ERISA is interpreted broadly to include certain insurance agents who under common-law rules would not be deemed to be 'employees.' " Dep't of Labor, Op. Ltr. No. 77-75 A, at 3 (Sept. 21, 1977).

Applying a 12-factor "common law" test, the district court concluded that Plazzo was an "employee" rather than an "independent contractor." [6] The court acknowledged that Plazzo, who was paid on a commission basis, was designated as an independent contractor in his agreement with Nationwide, that he hired his own employees and operated his own office, and that he set his own hours and relied primarily on his own initiative, skill, and judgment. However, the district court emphasized that Plazzo had represented only Nationwide for more than 20 years and that the company had exercised control over his activities by requiring attendance at sales meetings and setting sales quotas. The court also stressed that Nationwide exercised complete control over the terms of its agreements with its agents. Pet. App. 62-70. The district court concluded that Plazzo is "entitled to enforce payment of his pension benefits." *Id.* at 80.

4. The court of appeals reversed. It held that Plazzo was not entitled to benefits because ERISA's nonforfeiture provisions are not applicable to Nationwide's plans. Pet. App. 81-90. The court noted its recent holding in *Wolcott* v. *Nationwide Mut.*

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[6] The court of appeals summarized the common law test as calling for evaluation of the following factors: "1) the degree of control and supervision over the manner in which the work is performed; 2) whether or not the 'employee' is engaged in his own business; 3) the company's right to hire and discharge the persons doing the work; 4) the method of compensation to the 'employee'; 5) whether the 'employee' receives the same benefits as the company's regular employees; 6) who has control of the premises where the work is done; 7) how the parties structure their Social Security and income relations; 8) whether the 'employee' stands to make a profit on the work of those working for him; 9) the amount of the 'employee's' investment in facilities and equipment; 10) the belief of the parties as to their business relationship; 11) the amount of skill required in the particular occupation; and 12) the duration of time for which the 'employee' is employed." Pet. App. 87 (quoting *Wolcott* v. *Nationwide Mut. Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989)); see Restatement (Second) of Agency § 220 (1933).

Ins. Co., 884 F.2d 245 (6th Cir. 1989), that "the common law rules of agency should be used in determining whether an individual is an employee for ERISA purposes." Pet. App. 86-87. In that case, which also involved "a commissioned agent with Nationwide for twenty years" (*id.* at 88), the court had concluded that the agent was an independent contractor, rather than an employee, under the 12-factor common law test. Since Plazzo, like the agent in *Wolcott*, "owned and maintained his own office building"; "exercised managerial skill in operating his business"; "hired, paid, and established a health insurance plan for his employees"; "maintained bank accounts to pay the monthly expenses of operating his business"; "was paid on a commission basis and reported to the IRS that he was self-employed"; and "maintained his own Keogh retirement plan," the court of appeals held that he "was an independent contractor, not an employee for the purposes of ERISA." *Id.* at 89-90.

ARGUMENT

We believe the result below is consistent with the language and purpose of ERISA. As indicated by this Court's precedents construing similar statutes, the term "employee" should be defined by applying a modified common law test—one guided by the traditional understanding of the term but at the same time sensitive to the remedial purpose of ERISA. Under that test, Plazzo is properly considered an independent contractor, not an employee.

But the courts of appeals are currently divided on this important definitional question. We therefore believe that, as with other federal statutes that have raised a similar question of interpretation, the issue warrants review and resolution by this Court.

1. In our view, the court of appeals reached the correct result in this case.

a. Section 3(6) of ERISA defines " 'employee' in circular terms" (*Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1552 (D.C. Cir. 1990)) as "any individual employed

by an employer." Congress has either followed such an approach or provided no definition at all in many statutes. In a recent decision involving the question of employee status under the 1976 Copyright Act, the Court stated that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine." *Community for Creative Non-Violence (CCNV)* v. *Reid,* 109 S. Ct. 2166, 2172 (1989) (citing Federal Employer Liability Act cases).[7] Under the common law test, the ultimate question is whether "with respect to his physical conduct in the performance of the service," the person "is subject to the other's control or right to control." Restatement (Second) of Agency § 220(1) (1933). A focus on the right to control flows naturally from the purpose of the common law test, which is to determine whether a party should be held vicariously liable for another person's tortious acts.

In other circumstances, involving remedial social legislation, the Court has departed from a strict common law test in determining whether a person is an employee. Under the Fair Labor Standards Act of 1938 (FLSA), for example, the Court has concluded that "many persons" who " 'were not deemed to fall within an "employer-employee" category' " under the common law are nevertheless employees under the FLSA. *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 729 (1947) (quoting *Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 150-151 (1947)).[8] But while rejecting a strict common law test in FLSA cases, the Court has considered factors similar to those analyzed under the common law of agency. In *Rutherford Food,* for ex-

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[7] The conclusion that resort to the common law test was warranted was reinforced in *CCNV* by Congress's use of the term "scope of employment" in the Copyright Act provision at issue, since "scope of employment" is "a widely used term of art in agency law." 109 S. Ct. at 2172.

[8] The FLSA is particularly relevant here since the definition of "employee" under that Act – " '[e]mployee' includes any individual employed by an employer" (see 331 U.S. at 728 n.6 (quoting ch. 676, § 3(e), 52 Stat. 1060)) – is nearly identical to the definition of "employee" in Section 3(6) of ERISA.

ample, where the question was whether certain persons who worked as boners in a slaughterhouse were employees entitled to FLSA overtime pay, the Court noted that while "profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor." 331 U.S. at 730. Viewing "the circumstances of the whole activity," the Court concluded that the boners were employees rather than independent contractors. *Ibid.*

The Court has summarized the relevant determination in such cases by stating that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947). But while "reject[ing] the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants' " (*United States* v. *Silk*, 331 U.S. 704, 713 (1947)), the Court has also repeatedly borrowed the factors developed under the common law of agency.[9] Analysis of the common law factors has been tempered so as "to accomplish the purposes of the legislation." *Id.* at 712.[10]

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[9] The courts of appeals have similarly rejected application of a strict common law test for determining employee status for purposes of social legislation, although in many instances they have relied upon a variety of common law factors in fashioning a test. See, *e.g.*, *Donovan* v. *DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir.) (FLSA), cert. denied, 474 U.S. 919 (1985); *Clarkson Constr. Co.* v. *OSHRC*, 531 F.2d 451, 457-458 (10th Cir. 1976) (OSHA); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261 (4th Cir. 1974) (same); *EEOC* v. *Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (ADEA); *Cobb* v. *Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir.) (Title VII of 1964 Civil Rights Act), cert. denied, 459 U.S. 874 (1982); cf. *Korea Shipping Corp.* v. *New York Shipping Ass'n*, 880 F.2d 1531, 1535 (2d Cir. 1989) (Title IV of ERISA).

[10] In *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court appeared to abandon the common law test completely. It instead relied exclusively on its view of "the mischief to be corrected and the end to be attained" in determining employee status under the NLRA. *Id.* at 124. Congress rejected that approach, and amended the NLRA specifically to provide that "any individual having the status of an independent contractor" under the common law test is not an employee under the NLRA. See *NLRB* v. *United Ins. Co.*, 390 U.S. 254, 256 (1968).

The lesson of these cases is instructive here. When Congress, with little or no explanation, adopts the term "employee," it does so against a backdrop of long accepted, common law use of that term. At the same time, an automatic transference to remedial social legislation of a test designed to define and limit the master's liability for the torts of his servant could serve to frustrate the goals of that legislation.[11] Thus, the court has recognized the need for sensitive application of the standard, so that those who should fall within the law's protection are not excluded.[12]

b. In its advisory opinions issued with respect to employee status under ERISA, the Department of Labor has endeavored to apply a modified common law test of the sort utilized by this

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[11] ERISA falls squarely within the tradition of remedial social legislation which the courts have construed liberally to effectuate their purposes. As this Court has noted, "[o]ne of Congress' central purposes in enacting [ERISA] was to prevent the 'great personnel tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. PBGC, 446 U.S. 359, 374 (1980) (footnotes omitted). Congress enacted ERISA to ensure, among other things, that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required * * *—he actually will receive it." *Id.* at 375. See also *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *Smith* v. *CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984); *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1242 (7th Cir. 1983); *Eaves* v. *Penn*, 587 F.2d 453, 457 (10th Cir. 1978). "[T]he overwhelming evidence of the remedial purpose of ERISA must be given due weight in construing provisions whose language and specific legislative history are susceptible of varying interpretations." *Rettig* v. *PBGC*, 744 F.2d 133, 155 n.54 (D.C. Cir. 1984).

[12] In these related contexts, this Court has declined to elaborate the applicable test, or its interpretive methodology, in detail. Thus, in *Silk*, while rejecting strict application of the common law test and turning instead to "the declared policy and purposes of the Act" at issue (331 U.S. at 713 (citation omitted)), the Court nevertheless admitted that "[p]robably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship" (*id.* at 716). Rather, turning back to the common law test, the Court stated that the "Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operation are important for decision," but that "[n]o one is controlling nor is the list complete." *Ibid.*

Court in cases involving similar statutes. Thus, in response to a request for advice as to whether certain milk vendors were employees under the Act, the Department noted that, on the basis of the material provided, it did not appear that "the relationship between the milk suppliers and the milk vendors has any of the characteristics generally found in the relationships of employers and employees." Dep't of Labor, Op. Ltr. No. 81-88 A, at 4 (July 9, 1981). The Department sent the requester a copy of a recent decision "applying a common law test in determining whether an individual was an employee or an independent contractor," since that decision discussed "some of the factors which may be relevant" to determining employee status under ERISA. *Ibid.* While resorting to the common law test, however, the Department has also stated that "the definition of 'employee' as set forth in section 3(6) of ERISA is interpreted broadly," and may include persons "who under common-law rules would not be deemed to be 'employees.' " Dep't of Labor, Op. Ltr. No. 77-75 A, at 3 (Sept. 21, 1977).

In its administration of Title II of ERISA, IRS has also applied a common law test.[13] In *Professional & Executive Leasing, Inc.* v. *Commissioner,* 89 T.C. 225 (1987), aff'd, 862 F.2d 751 (9th Cir. 1988), a company devised a scheme to circumvent the minimum participation rules of 26 U.S.C. 401 and 410 in order to allow professionals to make themselves, but not their staffs, eligible for pension benefits.[14] Under the scheme, the professionals incorporated their practices and entered into service contracts with an agency that set up pension plans for the contract-

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[13] For discussion of the authority of the Department of Labor and IRS, see note 1, *supra.* The present case turns on the meaning of Section 3(6) (a matter in Labor's jurisdiction), but its resolution will affect the determination of whether pension rights have vested (a matter primarily in the IRS's jurisdiction). Thus, this case is an excellent illustration of the desirability of coordination.

[14] The minimum participation rules prohibit employers from qualifying a pension plan for the tax benefits available under Title II of ERISA if the plan does not provide benefits to a broad group of employees. The statute provides alternative methods for qualifying under the minimum participation standards; for example, a plan may be qualified if 70% of all employees benefit from the plan. 26 U.S.C. 410(b)(1)(A).

ing professionals and then "leased" the professionals back to their professional corporations. IRS determined that the professionals were not employees of the leasing agency, so that the plan did not qualify for favorable tax treatment. The Tax Court upheld that ruling, as well as the IRS's argument that "[t]o determine the existence of an employer-employee relationship we must look to common law concepts." 89 T.C. at 231.[15] As the Tax Court recognized (*id.* at 231 & n.10), IRS generally has relied on the common law test set out in its FICA regulations, 26 C.F.R. 31.3121(d)-1(c), to determine employee status.[16]

In short, the position of both agencies interpreting ERISA has been that whether a person is an employee should be determined primarily by analysis of the common law factors. But, in light of this Court's decisions construing remedial social legislation, the common law test must be sensitively applied in order not to frustrate Congress's goals in enacting ERISA. The inquiry normally depends on the factors in the common law test.[17] Yet as indicated by this Court's decisions under analogous statutes, the focus is not strictly on "control" but on all of the factors considered as a whole. And in close cases it is appropriate to consider which answer would further Congress's goals in

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[15] See also *Burnetta* v. *Commissioner*, 68 T.C. 387, 397 (1977) ("[i]n determining whether or not an individual is an 'employee' for purposes of section 401, we must look to the common law concepts used in making such a determination"); Rev. Rul. 75-35, 1975-1 C.B. 131 (where doctor formed a professional corporation with himself as the sole employee and a service corporation that employed his staff, the staff members were employees of the professional corporation for the purposes of ERISA's minimum participation requirements). Congress has recently enacted a special provision, 26 U.S.C. 414(n), governing employee leasing.

[16] IRS elaborated on that regulation, and on the common law test, in Rev. Rul. 87-41, 1987-1 C.B. 296. The Ruling sets out 20 factors to be used in determining whether a person is an employee.

[17] In its 1977 opinion letter, the Department of Labor suggested that one factor—whether a person is an employee for FICA purposes—was controlling. Dep't of Labor, Op. Ltr. No. 77-75 A, at 3-4. On reflection in light of this Court's decision in *CCNV*, which concluded that "[n]o one of these factors is determinative" (109 S. Ct. at 2179), the Department believes that all of the factors must be considered.

enacting ERISA.[18]

c. In this case, we believe that the court of appeals reached the correct result. As the district court recognized, agents like Plazzo set their own hours, are paid on commission, and rely primarily on their own initiative, skill, and judgment. Pet. App. 65-68. Indeed, they run their own businesses. As the court of appeals stressed, Plazzo incorporated his business, hired his own employees (and sponsored a health insurance plan for them), and even owned an office building. Plazzo reported to the IRS that he was self-employed and maintained a Keogh plan. *Id.* at 89-90.[19] In view of all these factors, it is clear that, as a matter of "economic reality" (*Bartels,* 332 U.S. at 130), Plazzo was an independent contractor.

To be sure, Plazzo was dependent on Nationwide to a significant extent since he represented that company exclusively for many years. His business no doubt would have experienced disruption had he allied it with another insurance company or had he decided to become an independent agent. But, in our view, the result in this case remains clear.[20] If agents like Plazzo are

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[18] Thus, for example, in a case such as the one involving the leasing of professional employees, IRS would properly look skeptically at any arrangement tailored to appear to be an employer-employee relationship under the common law test where the purpose of the arrangement is plainly to evade ERISA's minimum participation rules. Similarly, the agencies would properly question attempts to evade those requirements or to avoid paying pension benefits by giving employees the appearance of independent contractors. See, *e.g., Holt* v. *Winpisinger,* 811 F.2d 1532, 1534 (D.C. Cir. 1987) (clerical worker paid like, and listed as, independent contractor).

[19] Under 26 U.S.C. 401(c)(1)(A), "a self-employed individual" can establish a qualified retirement plan, commonly called a Keogh plan. If insurance agents such as Plazzo are "employees," then they are not "self-employed." Thus, a determination that Plazzo is an employee may disqualify his Keogh plan and subject him to back taxes based on the tax benefits obtained on account of the Keogh plan.

[20] In FICA, Congress provided that "employee" means "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee" (26 U.S.C. 3121(d) (2)), and added that the term embraces certain others, including "a full-time life insurance salesman" (26 U.S.C. 3121(d)(3)(B)). Thus, Congress

employees, then any retailer who works continuously and exclusively with another company—including, for example, the owners of many automobile dealerships—are employees rather than independent contractors. Such a result stretches the common law test far beyond its limits.[21]

Moreover, analysis of the relevant ERISA policies does not contradict the conclusion that Plazzo is not an employee. The most relevant ERISA policy in this case is that against "bad boy" clauses—clauses, like Nationwide's forfeiture provision, that disqualify persons for engaging in specified conduct that the employer seeks to prevent. ERISA prohibits such clauses in plans within its coverage to the extent that they would result in the forfeiture of vested benefits. See Rev. Rul. 85-31, 1985-1 C.B. 153; *Hummell* v. *S.E. Rycoff & Co.*, 634 F.2d 446, 449-450 (9th Cir. 1980). As the House Report noted, under Section 203(a), 29 U.S.C. 1053(a), "a vested benefit is not to be forfeited because the *employee* later went to work for a competitor, or in some other way was considered 'disloyal' to the employer." H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974) (emphasis added). See also H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 271 (1974) ("an *employee's* rights, once vested, are not to be forfeitable for any reason") (emphasis added); 120 Cong. Rec. 29,197 (1974)

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recognized that insurance agents are usually not employees under the common law rules. Moreover, Congress made clear that it did not intend its extension of the definition of employee in FICA to cover persons like Plazzo even if they sold only life insurance, since it further provided that life insurance salesmen are not employees for purposes of FICA if they have "a substantial investment in facilities used in connection with the performance" of their services. 26 U.S.C. 3121(d)(3).

[21] The district court in this case—which purported to apply a strict version of the common law test (see Pet. App. 62)—nevertheless concluded that Plazzo is an employee. Yet there is no doubt that if a person fell and was injured in Plazzo's office building on account of the negligent maintenance of the building, his remedy would lie against Plazzo and his corporation, not Nationwide. Many cases, of course, are closer, and the common law test does not always yield a clear answer. See *NLRB* v. *Hearst Publications*, 322 U.S. at 120 (there is no "simple, uniform and easily applicable test which the courts have used * * * to determine whether persons doing work for others fall in one class or the other").

ing "the policy against what has been described as 'bad boy' clauses") (statement of Rep. Dent). However, as the reports state, the policy against such clauses extends only to *employees* whose benefits have vested. Nothing in the Act or its legislative history suggests that Congress intended to prohibit forfeiture clauses in plans that provide benefits to persons who are truly independent contractors running their own businesses, rather than employees. In such instances, where the plan in question can fairly be regarded as part of a transaction between business entities, there is no justification for including the independent contractors within the class protected by ERISA's nonforfeiture rule.

2. In light of the disagreement in the courts of appeals, review by this Court is warranted.

The Fourth Circuit has taken a position different from that of the Department of Labor, the IRS, and each of the other courts of appeals that has considered the question presented. In *Darden*, that court abandoned the common law test completely. 796 F.2d at 706 ("[w]e conclude * * * that the common-law test for the relationship of master and servant is not the appropriate standard for application here"). Instead, the Fourth Circuit developed a three-factor test based exclusively on the purposes of ERISA as set forth in Section 2 of the Act, 29 U.S.C. 1001. That test—which considers whether the person reasonably anticipated benefits, relied on that expectation, and lacked bargaining power to obtain a nonforfeiture clause (796 F.2d at 706-707 (see note 5, *supra*))—is weighted heavily toward finding that any person who may participate in a benefit plan is an employee covered by ERISA.[22]

Other courts of appeals have expressly stated their disagreement with the Fourth Circuit's approach. In *Wolcott*, the Sixth Circuit noted that "[t]he *Darden* court rejected the common law

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[22] Congress might have extended the coverage of ERISA to all persons eligible to participate in plans providing benefits of the sort listed in Section 3(1) and (2) of the Act, 29 U.S.C. 1002(1) and (2). It instead limited coverage to plans providing retirement benfits to "employees" and plans providing welfare benefits to "participant[s]," which is in turn defined (29 U.S.C. 1002(7)) to mean certain "employee[s]" or "former employee[s]."

standard for defining 'employee,' and instead construed the term 'in light of the mischief [sought] to be corrected and the end [sought] to be attained' by ERISA." 884 F.2d at 250. The Sixth Circuit concluded (*ibid.*) that "the better reasoned position on [the] meaning of the term 'employee' is set forth in *Holt* [v. *Winpisinger*, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987)]." In that case, the District of Columbia Circuit held that "one must look to the common-law rules of agency to determine employee status" under ERISA. 811 F.2d at 1538. Similarly, the Fifth Circuit recently expressed its disagreement with the Fourth Circuit's approach, holding that "because Congress provided no specific statutory definition of 'employee' under ERISA we properly apply the common law of agency." *Penn* v. *Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1102 n.6 (1990).[23]

The difference in approach will likely lead to a difference in result in many cases. Indeed, the district court on remand in *Darden* concluded that a Nationwide insurance agent who is essentially indistinguishable from Plazzo is an employee under Section 3(6) of ERISA. *Darden* v. *Nationwide Mut. Ins. Co.*, 717 F. Supp. 388, 391-393 (E.D.N.C. 1989). Nationwide suggests (Br. in Opp. 12-13) that the court of appeals might reverse that result.[24] Of course, Nationwide does not contend that the Fourth Circuit panel may reconsider the holding of the prior panel and adopt the common law test that the prior panel rejected. Rather, in its brief in the Fourth Circuit, Nationwide stresses its argument that Darden did not satisfy the reliance prong of the Fourth Circuit's test, pointing to evidence showing that Darden had established an individual retirement account and had otherwise invested his earnings wisely. Nationwide's

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[23] The Seventh and Eighth Circuits have applied the common law test in cases arising under ERISA, but appear to have done so in order to determine what class the term "employee" as used in a particular plan was meant to cover, rather than to determine what Congress meant in Section 3(6). See *Short* v. *Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Richardson* v. *Central States, S.E. & S.W. Areas Pension Fund*, 645 F.2d 660 (8th Cir. 1981); *Wardle* v. *Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

[24] The case was argued on April 3, 1990, and is pending.

Opening Br. at 28-38, *Darden* v. *Nationwide Mutual Insurance Co.*, No. 89-2759(L) (4th Cir.). Thus, whether or not the Fourth Circuit panel reverses the district court, that circuit's test will differ markedly from that of the other circuits.[25]

While other courts of appeals have adopted positions closer to that of the Department of Labor, we are concerned that those courts may apply an unduly restrictive approach. In formulating their approach, those courts have properly emphasized this Court's invocation of "the conventional master-servant relationship as understood by common law agency doctrine" in *CCNV*, 109 S. Ct. at 2172. See *Mayeske*, 905 F.2d 1554-1555; *Penn*, 898 F.2d at 1102-1103.[26] But they have ignored this Court's decisions involving remedial social legislation—cases like *Rutherford Food*, *Silk*, and *Bartels*—which looked to traditional common law factors, but with an awareness of the very different context in which they were being applied.[27]

* * * * *

Although review by this Court is warranted, it should be limited to the first two questions presented in the petition.[28] There is no reason for review of the third question presented in the petition since there is no dispute that courts of appeals may freely review district court determinations as to whether a person is an employee. See *Penn* v. *Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1101 (5th Cir. 1990); *Holt*, 811 F.2d at 1536.

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[25] To the extent that the result under the Fourth Circuit's test depends on individual reliance by the particular person who claims to be an employee, the test would have unfortunate consequences. Under that approach, Nationwide and similar companies would not be able to determine at the outset whether they are operating "pension plans" subject to ERISA, since the result would ultimately depend on whether any person actually relied on the expectation of benefits under the plan in preparing for retirement.

[26] To our knowledge, however, no court has strictly applied the common law test as set forth in Section 220 of the Second Restatement of the Law of Agency (1933).

[27] Moreover, in *Penn*, where the court concluded that an employee lost that status (and hence entitlement to pension benefits) in part because the company changed his designation to independent contractor, we doubt that the court reached the correct result.

[28] Alternatively, the Court may wish to state the question in the form proposed in this brief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor

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